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IN THE

Supreme Court of the United States

October Term, 1968

No. 1280

UNITED STATES OF AMERICA *ex rel.* MARK FEIN,
Petitioner,

against

JOHN T. DEEGAN, as Warden of Sing Sing Prison,
State of New York,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This brief is in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review a judgment of that Court (Waterman, Feinberg and Bartels,* JJ.) rendered March 24, 1969, affirming an order of the United States District Court for the Southern District of New York (Palmieri, J.) dated

* District Court Judge of the Eastern District of New York, sitting by designation.

October 13, 1967, denying petitioner's motion for a writ of habeas corpus. By his writ, petitioner has sought to set aside his conviction in the Supreme Court of the State of New York, County of New York (Culkin, J. and a jury) for the crime of MURDER IN THE SECOND DEGREE (former Penal Law of the State of New York, §1046). Petitioner is presently serving his sentence in State Prison for a minimum term of not less than thirty years and a maximum of life (3885).*

Prior Proceedings

On February 25, 1964, Mark Fein, the petitioner herein, was indicted for the crime of murder in the first degree (4A-5A). The following autumn he was convicted of second degree murder after a five-week trial (2262-3). Before sentence was imposed, petitioner moved for a new trial (27B-399B). Thereafter a hearing was held on certain selected issues, which lasted some three weeks; petitioner's motion was denied by the trial court in a detailed opinion which appraises both the issues and the witnesses' credibility (3894-913; Appendix to petitioner's brief, hereinafter referred to as A. App., 84a-97a).

The Appellate Division of the Supreme Court, First Department, unanimously affirmed both the judgment of conviction and the denial of petitioner's motion for a new trial [24 App. Div. 2d 32, 263 N.Y.S. 2d 629 (1965)]. That

* Unless otherwise noted, all references are to page numbers of the Record on Appeal to the New York Court of Appeals, which has been filed with this Court. Where two numbers appear on a page of the Record, the number at the bottom of the page will be used as the reference.

decision was in turn affirmed by the Court of Appeals [per Keating, J.; Fuld, J., dissenting, 18 N. Y. 2d 162, 272 N. Y. S. 2d 629 (1966)]. The opinion of the Appellate Division appears in the certified record (3953-69) and at A. App. 66a-83a. The opinions of the Court of Appeals are also appendixed to petitioner's brief (A. App. 41a-57a). After having the New York Court of Appeals amend the remittitur (A. App. 58a-60a), petitioner then appealed and, in the alternative, petitioned the United States Supreme Court for a writ of certiorari. The appeal was dismissed for want of jurisdiction (DOUGLAS, J. dissenting) and the petition for certiorari denied [385 U.S. 649 (1967)] (A. App., 65a). After having the New York Court of Appeals again amend the remittitur (A. App., 61a-63a), petitioner applied to the Supreme Court for a rehearing; his application was denied [386 U.S. 978 (1967)] (A. App., 65a).

Following the denial of the petition for a writ of habeas corpus (A. App. 25a-38a), petitioner moved for a certificate of probable cause pursuant to 28 U.S.C. 2253. Judge Palmieri's opinion granting that application appears at A. App. 39a-40a.

The opinion of the United States Court of Appeals per Bartels, J. appears at A. App., 1a; Judge Waterman's concurring opinion at A. App., 23a.

Statement of Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

Statement of the Case

The trial record irresistibly established the petitioner's guilt of shooting his bookmaker, one Rubin Markowitz, four times in the head and chest, and while the jury's verdict was challenged by Point XV of petitioner's seventeen-point brief to the Appellate Division, there was no attack against it in the New York Court of Appeals. The murder, which occurred in an apartment rented by the petitioner under the pseudonym "Weissman", was the bizarre culmination of petitioner's sordid double life (503-10, 1112-16, 1123, 1137-9, 1283, 1445). Though surrounded by the indicia of social standing in the community, the proof at trial revealed that the petitioner spent considerable time and money in the nether world of assignations, call girls, private parties of perversion, and heavy gambling (*ibid.*). Already deeply in debt, the petitioner lost seven thousand dollars betting against the Los Angeles Dodgers in the 1963 World Series (563, 584-7, 1113-14). The petitioner thereupon arranged with a friend that he, the petitioner, would pay the bookmaker not only the money he lost, but also some $16,690 owed to Markowitz by that friend and another (561-2, 564-6, 571, 577-84). The killing permitted petitioner to pocket the cash furnished by his fellow gamblers while writing off his own debt, a coup of almost $24,000 (565-6, 574-5, 577-8, 582, 667-9). Once

the deed was completed, however, his composure failed and he sought assistance.

He telephoned his companion and procuress, Carmela Lazarus, a woman of many aliases, whom petitioner knew as Gloria Foster (1119, 1133). Mrs. Lazarus responded, with some reluctance, to the petitioner's distress signal (1133). Before quitting her apartment, she left a hasty message with another prostitute who remained behind, one Sandra Ede, and taxied the ten blocks to the petitioner's secret lodging (1134). There the petitioner told her that he had shot his bookmaker and pleaded for assistance in disposing of the body, which he had already stuffed into a steamer trunk (1137-9). Responding, Mrs. Lazarus telephoned one David Broudy, who drove over from an adjoining county (881, 961).

Meanwhile, Geraldine Boxer, whose custom it was to meet daily with Mrs. Lazarus for a light supper before each attended her respective evening class, drove to Mrs. Lazarus' apartment (700-1, 705, 905, 1130, 1132). Miss Boxer was directed by Miss Ede, over the intercom, to the "Weissman" apartment—the murder scene (706, 708-10).

Eventually, Miss Boxer and Mr. Broudy entered the "Weissman" apartment, the latter with the cheap pair of gloves he had been directed to purchase (710-15, 749-50, 882-4, 892, 972-3, 1141). Conceding the presence of the body in the trunk, the petitioner responded to Mr. Broudy's questioning by claiming that while he was paying his bookmaker, "somebody burst in * * * shot this man and scooped up the money and left" (893). Assuaging Mr. Broudy's fears about blood leaking from the

trunk, the petitioner advised that he had lined the bottom with "some canvas bags" (894-5).

The petitioner then arranged for the rental of a station wagon from a nearby concern, and with Mrs. Lazarus he went to pick it up (723-7, 821-6, 829-33, 897-9, 1014-15). By coincidence it was the same vehicle the petitioner had rented the previous day—arguably for the purpose of transporting the then newly purchased steamer trunk to the "Weissman" apartment (838-9, 894-5, 1017-18, 1048-9, 1066, 1548-9).

The petitioner gave Mr. Broudy the keys to the vehicle and departed, at the insistence of his three helpers, for an evening's dinner engagement (731-2, 904, 1939). The two women accompanied Broudy as he drove about Manhattan looking for a place to dispose of their cargo (737, 908). After a drive of some duration, they stopped by an isolated bank of the Harlem River, and consigned the trunk and its contents to the river (737-9, 801, 908-9, 1155-6).

During the weeks which followed, Mrs. Lazarus and Mr. Broudy responded to petitioner's pleas for assistance in attempting to obliterate all evidence that might have associated either him or the crime with the "Weissman" apartment (914-24, 1159-74, 1376). Thus, holes in the floor and wall were concealed with filler and paint, the carpet was first repaired and then destroyed, the furniture and furnishings removed, and the lock changed (*ibid.*). Additionally, the petitioner told a good friend that "he had gotten rid of the apartment * * * a week or two after the

World Series" and in December directed his landlord to terminate the lease (512, 555, 557, 652).

Concurrent with these activities, the petitioner had several conferences with the police, two of his own seeking; he was accompanied by counsel (433-5, 1477, 1489, 1492, 1495-6). The petitioner's evasions and prevarications to police questioning were foolhardy attempts to mislead both law enforcement officials and, as the judge at the post-trial hearing noted, his lawyer as well (3911, 1495-7, 1500-7, 1511).

Following his conviction, the petitioner moved for a new trial, filing affidavits which fill 376 pages of the record, plus exhibits (27B-484B). A hearing was consented to by respondent on the basis of four of the many claims: the failure of the prosecution to advise the defense of the names and stories of Dagmar Finch Generazio, Sandra Ede, Vera McNair and her daughter Yvonne Bennett (486B-493B, 497B-499B, 525B, 2297).

Dagmar Finch Generazio's post-trial story was that Mrs. Lazarus telephoned her before 4:00 p.m. on October 10, 1963, seeking a car to move a heavy box (2547, 2550-1). Since the proof at trial placed the killing after 4:00 p.m., the petitioner's argument throughout has been that this is exonerating evidence which the prosecution knew of, suppressed and, indeed, covered by tendering perjurious testimony. Without, at this point, detailing the hundreds of pages of evidence on the subject,* the short answer is that

* For the convenience of the Court, the respondent has lodged with this Court respondent's certified brief to the United States Court of Appeals for the Second Circuit, the appendix to which contains a complete summary of the evidence at trial.

the claim of prosecutorial suppression is absolutely without support, for both petitioner's attorney and his investigator testified at the post-trial hearing that they knew Dagmar had been to the District Attorney's Office and knew, while the trial was still in session, that she told of receiving a telephone call from Mrs. Lazarus on October 10, 1963, seeking the loan of an automobile (2914, 2917-19, 2928, 2955, 3003-4, 3018-19).

Sandra Ede's post-trial testimony is confused and contradictory, its substance varying from a denial of being present in Mrs. Lazarus' apartment when the latter was first called by petitioner and a denial of advising Miss Boxer over an apartment intercom of Mrs. Lazarus' whereabouts (3228-30, 3301, 3306), to an assertion that she was "not sure" of what happened on October 10th (3156-7). The latter account, a claimed lack of recollection of the events of October 10th, was the story Miss Ede insisted upon prior to trial (782-3, 3375-8), and repeated before a stenographer (189B-196B) and Miss Boxer (782-3, 786). This insistence of non-involvement, which the prosecutor swore was the only story Miss Ede ever told, was fully disclosed to the defense at the conclusion of the People's case; Miss Ede's name and address were also provided (3375-8, 1746-7).

The post-trial testimony of Mrs. McNair and Mrs. Bennett concerning the source of gunshot sounds also varied markedly from their pre-trial tales (2388-93, 2888-9, 2989, 3083, 3091-2, 3126-8, 3366-8, 3370-1, 3414). But whether they believed the shots to have emanated from a direction consistent with the murder site as they advised the prose-

cutor, or from a source directly opposite as they asserted after trial (in either event, evidence of a most tenuous nature), is less significant than the fact that one of the women, Mrs. Bennett, spoke with petitioner's first attorney, Saul Kassow, Esq., about several aspects of the case prior to trial (2981, 2984, 2989). In one of those conversations, to the best of Mr. Kassow's recollection, Mrs. Bennett denied hearing any shots at all (2989).

Summary of Argument

Petitioner has presented nine grounds for reversal in six separate points. Each of his contentions, save one pertaining to the trial court's instructions to the jury, was raised in his previous application to this Court some thirty months ago (see Jurisdictional Statement, Appellant's brief opposing motion to dismiss or affirm, and Petition for rehearing in *Fein* v. *New York*, October Term, 1966, No. 793). Since that time, although petitioner has re-presented these arguments in two additional courts, not one item, or word, of evidence has been added to the record filed with this Court in the earlier proceeding. No new argument has been presented to warrant review of this case on the merits on its second appearance in this Court, and the opinions of the District Court and the United States Court of Appeals merely confirm the correctness of the decision of the New York Court of Appeals.

Point I (p. 13, infra): Dagmar was not improperly kept from the petitioner. During the trial, the defense knew that she had been to the District Attorney's Office with the story that Mrs. Lazarus had called her on the day of the

killing to borrow a car. Dagmar's address never having been requested of the prosecutor, and he in turn knowing that the defense was aware of Dagmar's tale, the prosecutor violated no constitutional duty in failing to volunteer her address. Moreover, the story Dagmar told had nothing to do with the question of petitioner's guilt or innocence. It related solely to the credibility of Mrs. Lazarus.

After hearing Dagmar tell her story at the post-trial proceeding, the *nisi prius* court found her unworthy of belief. Petitioner's allegation of prosecutorial suppression of evidence is based on her version of her disclosures to the prosecutor—a version which the state courts reasonably rejected as false, after a full and fair hearing.

There is no substantiation to petitioner's contention that the prosecution deliberately and inaccurately edited Dagmar's name out of a significant phase of the case, the pre-trial recantation of Mrs. Lazarus. The thesis which petitioner presses, that Dagmar caused Mrs. Lazarus to recant, is not supported by the evidence. What caused Mrs. Lazarus to recant can only be speculated upon. At trial she gave one explanation, Detective Leman another. Detective Leman's statement was consistent with the prosecutor's post-trial analysis. Moreover, the occurrence of the recantation in question was volunteered to the defense by the prosecutor, a disclosure worthy of commendation, and inconsistent with a deliberate effort to suppress evidence helpful to the defense. Nor did petitioner's use of this evidence create a duty of further revelations, based on unfounded theories as to the true reason for the recantation. Petitioner's inquiry at trial was geared to show merely that the recantation was true. In support of this effort the defense interrogated at length. But its inquiry

into the cause of the recantation was brief and uninterested. Its inquiry into those present was sketchy and ambiguous.

Point II (p. 29, infra): The prosecutor did not improperly keep Sandra Ede, an unstable, uncooperative witness from the defense. During trial the defense was told of Miss Ede's story and her name and address. Though perhaps unnecessary, because the defense already knew of Miss Ede's story, the proffer by the prosecutor met the highest standards of fairness. Even Miss Ede's elusive post-trial story did not relate to the petitioner's guilt or innocence, but only to Mrs. Lazarus' credibility. And the post-trial court, after hearing Miss Ede's story, found her unworthy of belief, a finding supported by the record.

Point III (p. 34, infra): Mrs. McNair and Mrs. Bennett were not improperly concealed from the defense. Mrs. Bennett was a social acquaintance of one of the petitioner's attorneys, and he questioned her before trial about the subject of her post-trial testimony. Moreover, the substance of their evidence, the direction of the sound of gunfire some months earlier, is gossamer at best. These women were also reasonably found unworthy of belief by the post-trial hearing court.

Point IV (p. 38, infra): The prosecution cannot be charged with improperly suppressing a ballistics report which was in court during the entire trial pursuant to a defense subpoena. Moreover, the substance of the report, that a police officer's naked eye inspection of a hole in a floor board revealed no ballistics evidence, was not inconsistent with the proof tendered by another prosecution witness, to wit: that a microscopic examination disclosed fragments of metallic residue.

Point V (p. 40, infra): The petitioner suffered no prejudice in failing to obtain inspection of the death bullets prior to trial. He had full opportunity to examine them during trial. The inconsistency in evidence he alleges now is drawn from confusion in syntax by the prosecution witness, not from variation in substance. In any event, it was before the jury.

Point VI (p. 42, infra): The petitioner is in no position to challenge the method by which the police seized a chair which was received in evidence against him. He had previously abandoned it, having instructed a friend to get rid of it. Moreover, petitioner has no standing to suppress this particular piece of evidence, it not having been seized from him, but from a warehouse with which he had no contractual relationship. Finally, petitioner never sought a hearing prior to trial, as he was obligated to do under New York statute, and never pressed his contingent motion for a hearing during trial.

Point VII (p. 47, infra): Petitioner has offered no evidence that the jury which convicted him, selected from a special panel, was improperly prejudiced. State exclusion of jurors because of their scruples against capital punishment is no ground for vacating a non-capital judgment. And it is not by itself tantamount to a constitutionally prohibited exclusion of a recognizable, identifiable group.

Point VIII (p. 51, infra): The court's pretrial instructions as to the People's burden of proof, and petitioner's right not to produce witnesses or testify, violated no constitutional right of petitioner. The court's charge was also constitutionally sound. In addition, petitioner has never

challenged the court's charge in any proceeding prior to this one.

Point IX (p. 55, infra): Publicity did not interfere with petitioner's right to a fair trial. Although free on bail at the commencement of trial, petitioner never sought a continuance or a change of venue. The record is devoid of evidence showing that publicity improperly infected the trial proceedings.

POINT I

Failure to supply petitioner with Dagmar's address in no way deprived him of a fair trial; moreover, her existence and her story were known by the defense [answering petitioner's brief, pp. 13-27, 45-50].

Petitioner's prime contention, one of the eight present claims which he also raised in this Court two years ago, is that the prosecution, "[i]n an excess of zeal," deliberately chose "to suppress Dagmar [Finch Generazio] and the testimony she could give" (brief, p. 13). But far from being "successfully edited out of the case" by the prosecution (*ibid.*), both Dagmar and the tale she told were known to the defense while the trial was yet in progress.

Dagmar, a prostitute, was the friend whom Mrs. Lazarus allegedly telephoned seeking a car to move a box (2550-1, 2554). When questioned by the police and prosecutor on several occasions, Dagmar fixed the hour of the call variously between 6:00 p.m. and 9:00 p.m., on a day in late September or early October, 1963, recalling that she received it while at Gail Weiner Tracy's apartment (2300-7, 2315-16, 2370-6, 3344-9, 3352, 3357). At the hearing Dagmar testified that the call came between 3:00 and 4:00 p.m.

on October 10, 1963, and that, with but one brief exception, she had repeatedly so advised the prosecution (2547, 2550-1, 2599, 2728, 2805). Both statements were false.

At the same hearing, her husband, who was present when Dagmar was first interrogated by the police, corroborated, with some embellishments, that part of her account (2467-9). Gail Weiner Tracy, the girl with whom the then-single Dagmar was living, confirmed that a "week or so" before her October 13th birthday she answered the telephone and the caller, Gloria (Mrs. Lazarus), asked to speak to Dagmar (3523, 3527, 3594, 3683). Mrs. Tracy gave Dagmar the receiver and then heard her say, "no, no, no" into the telephone (3573). Mrs. Tracy noted, with some confusion, that the call came shortly after she took her three o'clock epilepsy pills (3594, 3600-1, 468 B). But she also conceded that during the seven month period she had discussed the subject with the prosecutor, she had, with but one post-trial equivocation, invariably denied altogether the occurrence of such a call and had, on one occasion, done so in Dagmar's presence (3530-3, 3535-8, 3541).

On the other hand, the trial assistant, Vincent J. Dermody, testified that when he first spoke to Dagmar she told of receiving a phone call from Mrs. Lazarus sometime in the latter part of September or early October and placed the time by inquiring "could it have been around 8 or 9 o'clock?" (3344-5, 3352). In an effort to fix the hour of the call more precisely, Dagmar recounted the events of that day in some detail, finally concluding that it occurred "sometime after seven o'clock possibly between six and seven, but I'm not sure. * * * All I know is that it was dark out, and when I entered the building the dry cleaning

n n was getting ready to close his store'' (3345-9). She never retracted this account of her activities nor claimed confusion (3360).

On a second visit to the District Attorney's Office, Dagmar confronted Gail Weiner Tracy with her story of receiving a phone call at her house ''sometime after or between 6:00 p.m. and 7:00 p.m. (3357). Before she could finish, Mrs. Tracy called her a liar, saying she never received a call on her phone from Mrs. Lazarus at any time (3357). Mrs. Tracy never retracted this denial (3384).

On a third visit to his office, Dagmar again assured Mr. Dermody that the late September or early October call came between 6:00 pm and 7:00 p.m., ''or even possibly later'' (3360-1, 3499).

Detective Leman testified to several conversations with Dagmar, including one at her house (2298-9). He was told that the call she had received from Mrs. Lazarus occurred ''Maybe it was eight o'clock or nine o'clock'' and, ''after six and close to seven p.m.'' (2315-16, 2372, 2431).

After hearing all the witnesses, the trial court found Dagmar Generazio a completely untruthful witness and rejected her testimony that she had received a call at any time. With customary thoroughness, the court, describing the basis for this conclusion, wrote:

> ''Having seen and heard this witness [Dagmar Finch Generazio], I reject her testimony as totally unworthy of belief. While under oath at the hearing she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded

criminal past, the date of her marriage, the frequency which the police telephoned her, or the reaction of Gail Weiner Tracy * * * upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon. I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief" (A. App., 93a).

* * *

"Sergeant Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required" (A. App., 94a).

* * *

"Her [Gail Weiner Tracy] testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter

she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P. M. because she had just taken her Dilantin and Phelantin pills, and her statement at the hearing that she took these pills only at 9 A. M. and 9 P. M. At 3 P. M. she used the Dilantin pill alone—her unvarying practice for thirteen years. If she had just taken the two pills she claims in the question and answer, the hour was obviously no where near 3 P. M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her" (3912-13, A. App., 96a-97a).

The court clearly had power to dispose of this issue on the sole ground that witnesses proffered lacked sufficient credibility to warrant a new trial. Those courts which have discussed this subject, have consistently affirmed that

> "the trial judge who approaches the question of the probable effect of the new evidence upon the result, in the event of a new trial, should be vested with a broad discretion in considering matters of credibility as well as of materiality. Stringent or artificial limitations upon the exercise of the discretionary power of the trial judge to grant new trials could only subvert the

purpose of the remedy." *Jones* v. *United States,* 279 F. 2d 433, 463 (4th Cir., 1960).

See also, *United States* v. *Lewis,* 338 F. 2d 137 (6th Cir., 1964), cert. denied 380 U. S. 978; *United States* v. *Luxenberg,* 374 F.2d 241, 250-1 (6th Cir. 1967).

The lengthy post-trial record offering support, in depth, for Justice Culkin's findings concerning credibility, his decision should not be disturbed. The confirmations of these findings by the Appellate Division [Dagmar was "clearly not * * * a source that a jury would be expected to credit" (3967, A. App., 80a)], and the Court of Appeals (A. App., 53a-54a), fixes them irrevocably. Speaking for the Supreme Court in *United States* v. *Johnson,* 327 U. S. 106, 111-12 (1946), Mr. Justice BLACK observed:

> "But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact [cits. om.]. While this appellate court might intervene when the findings of fact are wholly unsupported by the record, [cits. om.], it should never do so where it does not clearly appear that the findings are not supported by any evidence".
>
> * * *
>
> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not

> sit to try de novo motions for a new trial" (327 U. S. at 113).

The principle espoused by the *Johnson* decision was recently codified [28 U.S.C. 2254(d)].

Nor is there any risk that limiting review rewards those prosecutors who have "suppressed or concealed or withheld material evidence until after trial" (petitioner's brief, p. 49). This is not a case where a defendant was improperly deprived of material evidence. As will be shown more fully below (*infra* at p. 22), petitioner was adequately apprised of Dagmar's existence and Dagmar's tale while the trial was yet under way, though concededly by sources other than the District Attorney's Office. In the case at bar, the judicial power to weigh credibility stems, in part, from the nature of the proceeding: a defense attempt to obtain a new trial by the tender of evidence that was previously known and ignored. There is no inherent right to a new jury trial where, as here, the convicted murderer simply proffers a new defense and moves for further consideration. The present claim of blackmail followed by panic is merely a substitution for the defense first presented to the triers of fact, where petitioner's position was built on feigned ignorance of the events surrounding the killing of Rubin Markowitz.

Beyond these considerations, it should be observed that Dagmar's story does not relate directly to the issue of the petitioner's guilt or innocence. At most, it pricks Mrs. Lazarus' believability on a peripheral issue: her denial that she telephoned Dagmar. "Dagmar's testimony did not bear directly upon the guilt or punishment of Fein.

At most, it pertained to Gloria's credibility, provided one could bridge the gap of Dagmar's incredibility" (Bartels, J., A. App. 12a; see also 14a). Or, as Judge PALMIERI observed, the testimony "relates to the case in only an oblique way, going to Gloria's credibility. * * * It does not bear on the guilt or innocence of the petitioner. It does not exculpate the accused as did the evidence in the cases just discussed [*Brady* v. *Maryland*, 373 U. S. 83 (1963); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir. 1964); *Application of Kapatos*, 208 F. Supp. 883 (S.D.N.Y. 1962), quoted with approval in *United States ex rel. Meers* v. *Wilkins*, 326 F. 2d 135, 139-40 (2d Cir. 1964)]" (A. App., 32a). See also the opinion of KEATING, J., A. App., 54a.

Therefore, Dagmar's testimony is not grounds for a new trial. In an opinion that has remained unimpeached for over half a century, the New York Court of Appeals wrote, in *People* v. *Eng Hing and Lee Dock*, 212 N. Y. 373, 386 (1914):

> "The obvious purpose of the motion was to discredit the testimony of the two women * * *. This court has said (per Martin, J.) that a motion for a new trial should not be granted if the evidence is 'merely impeaching or contradicting the former evidence' (cits. om.)" [212 N. Y. at pp. 392-3].

See also *People* v. *Becker*, 215 N. Y. 126 (1915); *United States* v. *Hiss*, 107 F. Supp. 128, 136 (S. D. N. Y., 1952), aff'd 201 F. 2d 372 (2d Cir. 1953), *cert. denied sub nom. Hiss* v. *United States*, 345 U. S. 942 (1953); *United States* v. *Switzer*, 252 F. 2d 139, 146 (2d Cir. 1958).

In an effort to prove that Dagmar Generazio's story is exculpatory, petitioner now claims that he was the vic-

tim of an "extortion and blackmail scheme * * * obviously plotted" by Mrs. Lazarus (180B; brief, p. 12). His failure to tender this defense earlier apparently has its dual source in his being "not overly concerned as the date of his trial approached" and counsel's advice that he need not testify (179B; A. Br. to Appellate Division, p. 205). Be that as it may, new trials will not be granted solely to permit new defenses.

Moreover, even if Mrs. Lazarus did telephone Dagmar for a car to move a box, this would in no reasonable way tend to disprove petitioner's murderous deed. The outlandish "blackmail" theory suggested is not even supported, much less proved by the testimony offered. Such a telephone call does not eradicate the petitioner's complicity in the murder, nor does it transform Mrs. Lazarus into the engineer of an extortion plot directed at him.

If the call came at 6:00 p.m., the earliest hour at which Dagmar's equivocal pre-trial account ever fixed it, it would be completely consistent with the prosecution's theory, though possibly contradicting Mrs. Lazarus' trial testimony (1345-6). If the call came shortly after 3:00 p.m., as is presently claimed, at the most it might also tend to inculpate her as having had advance knowledge of the murder plan. But no reasonable inference from this fact exonerates the petitioner.

Moreover, the challenged testimony of Mrs. Lazarus related to an issue totally apart from guilt or innocence. And as the trial court observed, "suffice it to say that her character and reputation never were an issue" (3910, A. App., 95a; see also BARTELS, J., A. App., 12a; PALMIERI, J., A.

App., 32a; KEATING, J., A. App., 53a). The prosecution did not offer her as virtue incarnate, but rather as an eyewitness chosen by the defendant because she dwelt in "the depths that the defendant stooped to" (2120). The summation commended her not because she was beyond lying, but because she brought forth certain vital post-crime evidence. Indeed, little could be added to the clear and forceful manner in which the defense, throughout the trial, painted her untruthful instincts. It is apparent that the jury accepted material portions of her recital because they had the ring of truth, not because it had any illusions concerning the impeachability of her veracity.

Further, try though he may, there is no escaping the fact that the petitioner knew, while the trial was yet in progress, that a girl named Dagmar Finch had advised the district attorney that on October 10, 1963, Mrs. Lazarus had telephoned her in an attempt to borrow a car (3018-19). Aside from one passing attempt by a private investigator, Mr. Whelan, to obtain her mother's phone number from Detective Leman ["I didn't expect he would give it to me. In fact, he says, 'I'm not at liberty to give it to you' " (2930)]; not one member of the defense ever indicated to the prosecution that any difficulty existed in locating her. When petitioner asserts that during the trial "defense investigator [Whelan] * * * asked [Detective] Leman for her [Dagmar's] telephone number and address, so that the investigator could interview her (cits. om.)" (brief, p. 24), he misstates the record. As the New York Court of Appeals noted, "There was *no* request for the name, address or phone number of Dagmar nor any indication that the defense could not locate her" (A. App., 52a, n. 2) (emphasis in original).

The last the trial assistant knew was that Detective Leman had directed Mr. Whelan to Dagmar's mother in Baltimore, and that defense counsel referred to her during the cross-examination of Miss Boxer (765-6). Thus, the present case is clearly distinct from the many cases petitioner cites in support of his "affirmative disclosure" theory (brief, pp. 45-47). In each of them the defense was, at trial, unaware of the evidence it later submitted.

Petitioner now ignores his failure to ask the prosecutor for Dagmar's address, but in light of his knowledge of her existence and her story, that omission alone is fatal to his cause. Under these circumstances the requisite of diligence is statutory and immutable. See New York Code of Criminal Procedure §465 (7); *United States* v. *Costello*, 255 F. 2d 876, 880-1 (2d Cir. 1958); *United States* v. *Lombardozzi*, 343 F. 2d 127 (2 Cir. 1965). A special exception cannot be made in this case. (See opinion of Bartels, J. at A. App., 15a).

Failing to show a deprivation of material exculpatory evidence, the petitioner attempts to transform his contention into a claim of prosecutorial connivance at the use of perjury. The significance of this tack rests in the case law, for unlike the standards to be met before a second trial will be held on the ground of newly discovered evidence, the petitioner, in order to obtain another trial, need only show that the District Attorney failed to correct testimony he knew to be perjured. This follows even where the sole point goes to the credibility of that witness. New York's decisional law, including the case at bar, is founded firmly upon this principle. The record, however, does not

support the charge that the prosecutor engaged in any such wrongdoing. Indeed, the perjury claimed is non-existent.

The petitioner specifically argues that the failure of the prosecutor to "correct" that testimony of Detective Leman and Mrs. Lazarus which omitted Dagmar's name when listing those present at the time of the second recantation, deprived him of a fair trial (brief, pp. 19-23). Petitioner adds that this error was compounded because the prosecutor failed to rectify the erroneous explanations given by these two witnesses as to the cause of Mrs. Lazarus' second recantation, and still further aggravated when he concealed the details of the confrontation between the two women. As noted above, the record will not support this indictment against the trial assistant.

At the trial, Mrs. Lazarus testified that on September 28, 1964, she saw Mr. Dermody; Detectives Lyons and Leman were also present (1392-3). She recalled no one else there (1393). Upon inquiry as to why she had recanted on that date, Mrs. Lazarus responded, "For the same reason" as in June ["I truly felt sorry for the defendant and felt that my testimony would be detrimental" (1428)]; "The idea of coming here and saying these things that might hurt this man was against all my principles" (1429).

At trial, Detective Leman also omitted Dagmar's name from the list of those present at the second recantation (1635-7). When the moment arrived where Mrs. Lazarus directed him to leave the room, Detective Leman told the jury, "she accused me of questioning friends of hers, and being a—she accused me of being a Gestapo agent" (1666).

At the post-trial hearing, Mr. Dermody testified that when the two women confronted each other, Mrs. Lazarus "started to yell, and she accused Detective Leman of getting people to say things that weren't true about her" (3362-3). Detective Leman then took Dagmar out of the room and at about the same time Mrs. Lazarus spoke by telephone with her lawyer (3363, 3497). Mrs. Lazarus

> "blamed Detective Leman for cooking these things up and having these witnesses tell these stories" (3501).
>
> "She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar to trump up this story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it" (3507).

* * *

> "Q. According to your testimony, Mr. Dermody, when Dagmar confronted Gloria and gave her statement that you say she gave to you, it was after that that you say that Gloria changed her mind and said she had lied about what she told you?
>
> "A. But sometime after. This was not a spontaneous exclamation on her part.
>
> "Q. Sometime the same day?
>
> "A. That same day, but later on.
>
> "Q. And later on—how long? It was while Dagmar was still in the room, was it not, sir?
>
> "A. No, it was not.
>
> "Q. It was afterwards?
>
> "A. Yes. Dagmar, as far as I can—certainly she wasn't in the room.
>
> "Q. All right.
>
> "A. Well, I can't swear that Dagmar had already left the building" (3508-9).

At the post-trial hearing Detective Leman testified, in response to specific questioning, that on September 28, Mrs. Lazarus "just exploded" upon hearing Dagmar's account of the telephone call (2326). As he recollected, Dagmar left the room before Mrs. Lazarus (2328). He also departed, although he does not indicate when, and was not present when Mrs. Lazarus actually changed her story (2328-9).

The evidence is undisputed that Mrs. Lazarus "exploded" upon being confronted by Dagmar's story, but did not recant until sometime later. When she did recant Dagmar was not present, nor was Detective Leman. Indeed, he seems to have escorted Dagmar out, returned, and then been directed out later at Mrs. Lazarus' insistence. Thus, the police officer was accurate in omitting Dagmar's name from those present at that time (1638). She was not there. Mr. Dermody's description that "She was mad at Leman," "accused Leman of trumping up this story, getting Dagmar to trump up this story * * * out of spite to Leman she told us she wouldn't testify," in no way conflicts with the detective's account at trial; "she accused me of questioning friends of hers * * * of being a Gestapo agent." (If this prosecution witness was conspiring to conceal by committing perjury, certainly he would not have volunteered this provocative item to defense counsel at trial.) The post-trial examination was simply developed at greater length and with greater specificity.

The brief examination covering the persons present with Mrs. Lazarus when she recanted lacked the scope

which petitioner now alleges. As the Appellate Division succinctly concluded, "who was present at the interview was not emphasized and received only cursory attention" (3969, A. App., 82a). The specific questions certainly did not cover all the people Mrs. Lazarus met during her entire visit on September 28th. And yet, without such a broad scope, it is difficult to see how she, or the trial assistant, could be aware that the answer given might be construed as inaccurate at a later date. Its very ambiguity left it to the listener to interpret. Thus, while the petitioner may presently insist that the question covered only one point of concern, the contrary can just as reasonably be argued. Indeed, Mrs. Lazarus' omission of Dagmar's name from among those present at the moment of recantation was an accurate account. (See also opinions of STEUER, J., 3968, A. App., 81a; and Bartels, J., A. App., 11a.)

Petitioner now urges that Detective Leman must have been testifying about the earlier meeting when Dagmar was present and not the moment of recantation, because he was not there at that later hour (brief, p. 21). But the premise of petitioner's argument exposes the invalidity of his conclusion. When Detective Leman later learned of Mrs. Lazarus' change of story, he obviously surmised who was still present. Certainly he knew that Dagmar was not; he had previously escorted her out. Thus, he spoke with accuracy in listing those present at the time of recantation.

The record repeatedly demonstrates that the trial assistant was continuously on guard that the events should be fully and accurately presented to the jury. In an unusu-

al aside, Judge KEATING, speaking for the New York Court of Appeals, lauded the prosecutor for his "strong sense of fairness" (A. App., 52a). The prosecutor voluntarily disclosed the pretrial recantation, for the benefit of the defense; and at least twice during Mrs. Lazarus' testimony he called the court's, and the petitioner's attention to inaccuracies, once in connection with her denial of having seen certain grand jury minutes (1414-15), and again in relation to the disposition of criminal charges she yet faced (1421-3).

Despite petitioner's appellation of the cause of recantation as a "fact" (brief, p. 22), why Mrs. Lazarus temporarily altered her account is plainly not subject to objective analysis alone. Detective Leman's interpretation of her act differed from Mrs. Lazarus' explanation. Perhaps both were correct. Of paramount importance is that each explanation was before the jury, as was, of course, the act of recantation itself. But surely it cannot be held against the prosecutor because he failed to tender his subjective understanding of why Mrs. Lazarus did something, an understanding which, incidentally, coincided with that previously offered by Detective Leman at trial.

While the cause for Mrs. Lazarus' recantation appeared twofold at trial, the record will not support petitioner's present attribution of motive for recantation to the confrontation with Dagmar (brief, p. 22). To conclude so is sheer speculation. The argument he builds therefrom —that it was constitutional error not to give the details of that meeting—must fall, as it is without foundation.

POINT II

There was no prosecutorial suppression of Sandra Ede's "evidence" [answering petitioner's brief, pp. 27-30, 45-50].

The petitioner also offered Sandra Ede as the basis for a new trial. She was the prostitute who took messages for her friend Mrs. Lazarus at the latter's apartment and was present when the petitioner called seeking help in the late afternoon of October 10, 1963 (1133-34). After Mrs. Lazarus had responded to that call and departed, Miss Boxer arrived at Mrs. Lazarus' building, pursuant to their prearranged rendezvous (705-6). Upon conversing on the lobby intercom with Miss Ede, Miss Boxer went to the "Weissman" apartment at 406 East 63rd Street (708-9). There she helped the petitioner attempt to conceal the murder.

Near the conclusion of the People's case the prosecutor observed that when Miss Ede had been questioned at the District Attorney's Office, she

> "claimed to have had no recollection of the events that allegedly transpired on October the 10th.
>
> "It is for that reason that the People did not call her as a witness. However, I want to furnish counsel with the name, full name of this person, and her address for their benefit, so that they can do whatever they want with it.
>
> "The name of the woman is Sandra Ede—E-d-ē. She resides at 2575 Palisade Avenue, Riverdale, New York" (1747).

The petitioner contends that this statement was "disingenuous," that Miss Ede had in fact given the prosecutor a different, and exculpatory, account indicating that although she had no recollection about October 10, 1963, she never gave any message over the intercom (brief, p. 28). As is shown below, this contention is factually wrong, and even on its own terms this is merely a collateral point, magnified out of all proportion to its significance in the case.

Eschewing restraint, and ignoring recorded facts, the petitioner in moving for a new trial also charged that the prosecution met "repeatedly" with Miss Ede and "pressed her * * * to lie for them" (31 B-32 B). Unsuccessful, the prosecution then transcribed a statement, and "The police and prosecutor hounded her until her health broke and she was institutionalized" (32B). Petitioner concluded that the "ploy" of giving the defense her name and address was "doubly misleading"; the substance of her story was misrepresented and "previous defense counsel could not even contact Sandra, at the time, because she was under psychiatric care in a hospital" (33 B).

Miss Ede herself refuted most of these vicious charges, and all of the credible, material, and relevant evidence establishes both the lack of merit to her second story and the absolute propriety of the trial assistant's behavior.

After hearing Miss Ede, and Messrs. Leman, Dermody and the late Alexander Herman (then Chief of the District Attorney's Homicide Bureau who interviewed Miss Ede prior to trial), the trial court wrote:

> "In court she [Miss Ede] indicated, although with some ambiguity, that it was her practice not to speak

to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was exceptionally anxious not to be a witness—either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recollect 'one way or the other' the events of October 10, 1963, or any other day during that period, with respect to her participation in a conversation over the intercom with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was 'she said she didn't remember.' It is further certain that the statements by defendant's attorney concerning the inaccessibility of Miss Ede, at the time her name was tendered by Mr. Dermody at trial, are inaccurate. She was available as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman [trial counsel] on this subject, in spite of this court's express request. Similarly, it is plain that the defendant's charges that the prosecution harassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge'' (3906-7, A. App., 92a-93a).

In this proceeding, the gravamen of petitioner's contention revolves about Miss Ede's post-trial assertion that

she never gave messages over the intercom. Mr. Dermody flatly denied ever being so advised (3375), as did Detective Leman (2411, 2422-3) and Mr. Herman (3288).

In arguing that the Appellate Division expressly "found" that Miss Ede had told the prosecution of not passing on the message, petitioner misinterprets that opinion (brief, p. 30). The only judicial "findings" in the record are those of Judge Culkin, quoted in part on the preceding two pages. When the appellate court writes, "On the motion for a new trial it was established that," the word "motion" must be defined as limited to the pre-hearing papers. Twice elsewhere in the Appellate Division opinion, the word "motion" is used in this narrower, but nonetheless proper, sense (see footnotes at 3958, A. App., 71a; 3963, A. App., 76a). Where there is sufficient in the record to support the trial court's findings, it cannot be assumed, as petitioner does, that they were overruled *sub silentio*. The main thrust of Mr. Justice Steuer's opinion is that, on the basis of the affidavits presented, no hearing was warranted on the Ede matter. Thus, the court writes, "whether or not" the claimed matter was disclosed by the prosecutor, the defense already knew about her and therefore the "contention of concealment was not proved" (3963, A. App., 76a). In adopting the broader definition of the word "motion," petitioner is left with a structural contradiction which he ignores here, and in the state courts could only explain away as "egregious error" (A. brief to N.Y. Ct. of Ap., p. 36); in limiting the definition the inherent logic of the opinion follows throughout. Plainly the narrower interpretation is the one to be selected, as was done by the New York Court of Appeals (A. App., 45a).

The trial assistant was faced with a witness who had every reason to know whether or not she had a role in the singular whirl of events which followed the petitioner's request for help, but who steadfastly equivocated. She would neither affirm nor deny, repeating endlessly, "I don't remember."

In an effort to ascertain the truth, the prosecutor confronted Miss Ede with Miss Boxer's account. As Miss Ede herself recounted, her response to Miss Boxer was, "I don't remember any of these things, you know, but I don't want to call you a liar * * * I don't know" (3201). [See also Miss Boxer's (782-3) and Mr. Dermody's accounts (3378) of this confrontation.]

The trial assistant also ascertained that a telephone had been installed in Miss Ede's Riverdale apartment on October 10, 1963, and so advised her. Despite this fixed incident, Miss Ede still could shed no light. She asserted the truism that she could not be in two places at the same time, but refused to deny, or admit, that she conveyed a message for Mrs. Lazarus on that date (3164-5).

Miss Ede was confronted with Mrs. Lazarus. Still she "could not remember one way or the other" (2402).

In addition, as she twice admitted, Dagmar also placed Miss Ede in Mrs. Lazarus' apartment before 4:00 p.m. on the afternoon in question (2662, 2669). But Miss Ede still claimed insufficient memory. It should never be forgotten that, throughout, the trial assistant was confronted with a witness whose instability was apparent, and ultimately confirmed medically.

In the light of these circumstances, choosing not to call Miss Ede to the stand cannot be faulted. No higher standard could be demanded than that exhibited in the investigation of her story. She had nothing to add to the case. The offer of her name and address, though perhaps unnecessary in view of the petitioner's knowledge of Miss Ede and the details of her conversations in the District Attorney's Office (780, 782-4, 786, 808), was fairly and timely made.

Moreover, the credible evidence shows that the appellant was not misled by the prosecutor's statement. As pointed out by the four courts which have discussed the merits of petitioner's claim (A. App., 28a, 45a, 76a, 92a), the defense knew about Miss Ede, and questioned Miss Boxer about her before and during the trial. Petitioner is precluded from offering her as a witness now when he rejected the same opportunity at trial.

POINT III

There was no prosecutorial suppression of the "evidence" offered by Mrs. McNair and Mrs. Bennett [answering petitioner's brief, pp. 30-32, 45-50].

At the hearing on his motion, the petitioner produced two witnesses, residents of the East 63rd Street building where the murder occurred. These women, Mrs. McNair and Mrs. Bennett, testified that they recalled hearing four gunshots coming from a direction opposite from the petitioner's apartment (2827-9, 3071-3, 3091-2). On the basis of this testimony and the failure of the People to volunteer

them as witnesses at trial, the petitioner claims he is entitled to a new trial.

This claim was properly rejected by the courts below. First, the defense not only knew of the existence of the witnesses, but had unusually good access to them since one of the women, Mrs. Bennett, was a social acquaintance of one of the petitioner's attorneys, Mr. Kassow (2837, 2846, 2888-90, 2894, 2959, 2970, 2973-4, 2977-8, 2981, 2984, 2989). Second, the pre-trial account given by the witnesses to the prosecutor, far from being the material exculpatory evidence now alleged, was in fact strongly inculpatory and wholly consistent with the People's theory of the case (2344, 2387-8, 2395-8, 3365-7, 3370). The only evidence found credible is that the witnesses repeatedly told Mr. Dermody and detectives that they heard shots coming from above them and toward the front of the building, the direction of the petitioner's flat (*ibid.*). The witnesses also told the prosecutor that they had disclosed to the defense their recollection as given to the prosecutor (3368, 3371, 3414). Finally, the reliability of these witnesses and the accuracy of their perception and recollection was seriously undermined. Their ability to identify the sounds they heard as gunshots, their changing accounts, and the implausibility of their other claims all led the trial court to conclude that they were "completely confused." Stating the reasons for this conclusion fully, the court wrote:

> "The defendant offered the testimony of mother and daughter, neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable

light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building—and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information" (3904-05; A. App., 90a-91a).

Once the credibility of Mrs. McNair and Mrs. Bennett have been found wanting—and it is a preposterous story they tell—the refusal of the trial assistant to call them as witnesses is beyond fault. See opinions of Appellate Division at pp. 3964, 3967, A. App., 77a, 80a; and of the New York Court of Appeals, 46a-47a. Indeed, the decision is repeated by the defense. It is conceded that the petitioner knew that these women were witnesses to the very important presence of the trunk in the building. One can only surmise what appraisal of their yarn was made when Mr. Kassow, the attorney of record, conferred with trial counsel, Messrs. Blinder and Kleinman. The result of that colloquy is a known fact. The women were never even sought for questioning.

In sum, great violence would be done to the concept of prosecutorial suppression if a situation such as this one were deemed cognizable thereunder. The defense decision not to pursue known witnesses is a binding one, for the sound order of criminal trials requires diligence on the part of defense at their first opportunity [N. Y. Code Crim. Proc. §465(7)] and not repeated trials to correct possible omissions or errors of defense judgment.

POINT IV

The prosecution cannot be cited for an interference with petitioner's constitutional rights owing to his failure to examine a report he subpoenaed; in any event, there was no prejudice [answering petitioner's brief, pp. 32-33, 45-50].

Petitioner contends that a "fourth instance of suppression occurred when the prosecution failed to make known to the defense, Detective James E. Kelly's ballistics report" (brief, p. 32). He misconstrues the prosecutor's obligation. However, before even reaching the substance of his claim, petitioner faces a procedural hurdle of fundamental importance. While this identical claim was raised in the state courts and appealed to the United States Supreme Court, it did not appear in the District Court. Petitioner included this point in his appeal to the court below (Appellant's brief to the U.S. Ct. of Ap., pp. 19-20), but that court did not discuss it. Respondent's brief to the United States Court of Appeals (Respondent's brief, p. 34) noted that, "It is difficult to understand how appellant can include this point among the errors he charges to Judge Palmieri when he did not present it to Judge Palmieri." Since the court below was in no position to review this issue, it is submitted that the petitioner cannot properly raise it on this certiorari petition.

Detective Kelly's report (150B) was subpoenaed by the defense, at the outset of trial, and was in the physical possession of the court during the trial (3904, A. App., 89a; see also opinion of N.Y. Ct. of Ap., A. App., 45a). Petitioner's contention that he did not have access to any of

the reports in court pursuant to a general defense subpoena, unless he specifically identified the desired report (brief, p. 33), simply does not accord with the trial court's practice. There were no such limiting rules set forth, nor are there any cited. Indeed, there were numerous occasions when a general request by defense counsel brought forth all documents related to a witness' testimony (*e.g.*, 1553-7). As the trial judge noted, the Kelly report was "his to utilize as he saw fit. His choice having been made, he is bound by it" (3904, A. App., 89a; see also A. App., 45a).

In any event, the contents of Detective Kelly's report amounted to a cipher. He probed the hole in the floor of apartment 5-B "for ballistics evidence without results" (150 B). Confirming the plain meaning of this language, he later observed in an affidavit, "This specifically means that I did not find a spent bullet or any fragments which could be identified as coming from a bullet. Due to the condition of the hole I cannot say one way or the other whether the hole in its original state was caused by the entrance of a bullet" (517 B). In other words it was "an inconclusive naked eye examination" (A. App., 45a). Following this inspection, the floor boards were sent to the police laboratory. There, Detective O'Brien examined the area through a microscope and discerned "three minute fragments of metallic residue" (1724). This, of course, in no way conflicted with Detective Kelly's inability to discover the same with his naked eye. Rather, it "fully superseded" the Kelly test (A. App., 45a).

The defendant does not claim that he was deprived of Detective O'Brien's laboratory report.

POINT V

Denial of petitioner's pre-trial motion for inspection of bullets did not contravene his constitutional safeguards; moreover, no prejudice was or can be shown [answering petitioner's brief, pp. 33-34, 50-53].

While neither the Constitution of the United States nor the statutes of New York State command a pre-trial right to discovery and inspection, New York case law has taken cognizance of this right where required by the "exigencies of defense." *People* v. *Golly,* 43 Misc. 2d 122, 123, 250 N. Y. S. 2d 210, 213 (Sup. Ct., N. Y. Co., 1964). Cf. *United States* v. *Garsson,* 291 F. 646, 649 (S. D. N. Y. 1923); *United States ex rel. Bund* v. *LaVallee,* 344 F.2d 313 (2d Cir. 1965), *cert. denied* 382 U. S. 867. Far from presenting persuasive reasons for examination of the bullets in question prior to trial, the petitioner merely stated that they were "pertinent" (36A). Now, in a belated attempt to magnify the significance of his application, petitioner erroneously asserts that the denial of his pre-trial motion left him "in no position to assess Haase's [the prosecution's ballistics expert] testimony or to cross-examine him adequately" (brief, p. 34). Not only was Detective Haase cross-examined by the defense—without request for recess to permit further examination of the bullets—but his written reports on the subject were in court throughout the proceedings pursuant to petitioner's subpoena and, as the trial court observed, "were his to utilize as he saw fit" (3904, A. App., 89a).

Petitioner's present claim of prejudice therefore rests solely on his post-trial "tender [of] expert evidence that

Haase's testimony had been 'erroneous and misleading' " (brief, p. 34). From his analysis of the record, petitioner's expert concluded that the jury was misled into believing that "all four bullets were shot from a single firearm" (*ibid.*). But a full reading of the record rebuts any such conclusion. Indeed, when asked "What type of weapon would the bullets have been discharged from?" Detective Haase responded, "They would be capable of being discharged from various rifles or pistols with a right six rifling" (267). It is true that his characterization of "right six rifling[s]" on each of the four missiles conflicts with earlier testimony that only three bullets bore indicia of "right twist rifling" and only one, MD-4, "right six," but this conflict was before the jury. An analysis of earlier testimony clearly shows that Detective Haase found "six lands and grooves," or a right six rifling, on only one bullet (265). Petitioner's argument in the state courts that this caused utter confusion can be drawn entirely from the trial record, and was therefore, as the trial court noted, "open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely" (3904, A. App., 89a).

In sum, as Judge Palmieri succinctly concluded, petitioner "has pointed to nothing that would establish prejudice * * *" (A. App., 38a).

POINT VI

There was no violation of petitioner's Fourth Amendment rights by the seizure from another party of the chair which he had abandoned; further, his motion for a hearing was untimely, and his claim knowingly waived [answering petitioner's brief, pp. 34-37, 53-60].

During the direct examination of petitioner's friend, Mr. Tishman, the prosecution offered for identification a chair which had, on the day of the murder, been in the petitioner's "Weissman" apartment (588). At that time defense counsel stated:

> "If this furniture purports to be furniture that was in the apartment, Apartment 5B, which is the apartment in question over here; and if that apartment was entered into without a search warrant; or in the alternative, since we have already heard some furniture had been stored in some furniture storage warehouse, if this furniture had been secured from this furniture storage warehouse without the proper legal warrant or proper legal authorization, I object to it; and I shall move to suppress this evidence; and if necessary to hold a hearing if the facts are as I have suggested" (588-9).

It was then agreed, after a conference among counsel, that the chair would be marked for identification so long as the defense was not deemed to have waived its right to "raise the question of a warrantless seizure of this piece of furniture and to raise the question of the legality of the evidence in a motion to suppress later" (593). "Later" arrived in eight days, during the direct examination of Mrs.

Lazarus, on November 10, 1964, when the chair was offered in evidence (1192-3). The chair was received over a general objection and, contrary to petitioner's statement, without a refusal by the trial judge to conduct a hearing (brief, p. 59). There was simply no request for a hearing or *voir dire* (1193). Subsequently, petitioner's attorney noted:

> "Now, if your Honor pleases, I move to strike from the record the introduction of the chair into evidence.
>
> "The Court: Overruled.
>
> "Mr. Kleinman: May I without a discussion about it, call your Honor's attention to a discussion we had at the bench one time a few weeks ago?
>
> "The Court: Yes, I am familiar with that; but under the testimony here, the objection is overruled" (1194).

And this was clearly a proper ruling, for the evidence before the court left no alternative. Mrs. Lazarus had been instructed by the petitioner to remove all the furniture, including the chair, from the 63rd Street apartment. "Just get rid of it. I don't care what you do with it," he told her (1173). Mrs. Lazarus' solution was to hide the furniture in a warehouse she had dealt with in the past (1173-4, 1193). The method of disposal was her own; it was not pursuant to any instructions by petitioner.

Petitioner's assertion that the trial court "totally denied" him a hearing will find no support in the record (brief, p. 58). Once he agreed to postpone his exploration of the Fourth Amendment issue (593), never again during trial did he seek a special hearing. See also opinion of Bartels, J., A. App. 17a-18a.

From the foregoing, it is beyond serious dispute that the record supports the finding of the hearing court that

petitioner abandoned his title to and possession of the chair when he left it to Mrs. Lazarus to dispose of it as she would (A. App., 85a). When she placed it in the Century Moving & Storage Warehouse, her feminine reaction against destroying perfectly good property, petitioner retained no rights cognizable by the Fourth Amendment which could have been breached by the subsequent acquisition of the property by law enforcement authorities.

Mrs. Lazarus' testimony in this regard was never challenged by the petitioner. And the reason for his attorney's perfunctory objection is obvious. Defense counsel initially based his statement on an incomplete understanding of the facts relating to the seizure (588-9). The warrantless search of the warehouse took on an entirely different legal significance when it became clear that the petitioner had abandoned the chair. E.g. *Hester* v. *United States,* 265 U. S. 57 (1924); *Abel* v. *United States,* 362 U. S. 217 (1960); *People* v. *Robinson,* 15 N. Y. 2d 559 (1964); *United States* v. *Copeland,* 263 F. Supp. 976 (S.D.N.Y. 1967); *Application of Zerga,* 218 F. Supp. 759 (S.D.N.Y. 1963). The necessary conclusion was that the petitioner was in no position to complain for the furniture was no longer his, and, more important, Mrs. Lazarus had the right to turn it over to anyone at all, including law enforcement officers. Indeed, on the day she was finally picked up by the police, she was attempting to change the name of the bailor from Weissman to Williams, an attempt which was solely "her idea" (1643). See also opinions of Bartels, J., A. App. 19a; Palmieri, J. at A. App. 36a-37a; and Keating, J., A. App. 43a.

Petitioner's present chastisement of the trial court for not expressly stating its basis for denying the suppression motion is contrived. The conclusion that petitioner draws therefrom, that only with such judicial opinion could Mrs. Lazarus "have been fully cross-examined" (brief, p. 59), is astonishing. If he wanted, or needed, the "theory" for the court's ruling prior to cross-examination, he should have asked for it, or made his motion when it ought to have been made—before the trial commenced.

Further, the petitioner "has no standing to assert the violation of any constitutional rights as to this seizure" (PALMIERI, J.; A. App., 36a). See also opinion of Bartels, J. at A. App. 18a-19a.

Some years ago the Supreme Court described those persons who have standing to suppress evidence. It wrote:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been the victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Jones* v. *United States,* 362 U. S. 257, 261 (1960).

Petitioner does not qualify. In his brief, he sets forth a number of citations, arguing that these cases reflect a split in the authorities on the requirements of standing, and urging that there is precedent which provides him with the necessary standing (brief, pp. 54-57). Examination of the cases he cites indicates little support for his contention. Indeed, *Alderman* v. *United States,* —— U.S. ——, 37 U.S.L. Week 4189, 4191 (March 10, 1969) is one of the

clearest statements yet of the principle that "* * * Fourth Amendment rights are personal rights which * * * may not be vicariously asserted."

The chair seized from the Century Moving and Storage Warehouse, was arguably

> "seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him, and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion. * * * We are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth" (*id.* at pp. 4191-2).

Plainly, the chair was not taken from Mark Fein, nor from any site over which he exercised even a modicum of possessory right or right of privacy.

Finally, petitioner ignores the statutory barrier which sets forth New York's governing procedural requirements, but it is well nigh insurmountable. Discussing Section 813-d of the New York Code of Criminal Procedure, he points to certain protections that that statute affords (brief, p. 35). He fails, however, to mention the mandate which requires that a defendant make his motion to suppress only before trial commences unless he falls within one of several expressed exceptions, none of which applies here, or has been urged (compare Rule 41e of the Federal Rules of Criminal Procedure). The People's argument to this effect was

never rejected by the state courts (but see, A. App., 36a), nor answered by petitioner. No good reason why an exception to the orderly requirements of Section 813-d has ever been tendered by the ably assisted petitioner.

Petitioner also claims that certain facts suggesting that the chair was unlawfully seized are "not disputed" (brief, pp. 34-35). Of course they are. But this "dispute" is no longer an issue of concern to the courts. Counsel's failure to seek a hearing to suppress the evidence constitutes a complete and deliberate waiver. There cannot be the slightest doubt that this constitutional point, like so many others, is waivable. This is particularly so where, as here, the petitioner was represented by eminent and experienced attorneys who displayed complete familiarity with the liberal and frequently utilized procedures for litigating the issue in the *nisi prius* court. Under the circumstances, it is as fruitless as it is unnecessary to scan the record for probable cause or consent. The issue having been waived, there was no occasion for adducing whatever evidence there might be.

POINT VII

The selection of a jury from a special panel was not in contravention of petitioner's constitutional rights [answering petitioner's brief, pp. 37-40, 60-72].

Petitioner argues that "New York's blue ribbon jury statute [former section 749-aa of the New York Judiciary Law, repealed in 1965] * * * violates the Sixth and Fourteenth Amendments" (brief, p. 60). His argument is not directed at the sentencing, for the court alone considered the question of sentence. Rather, the petitioner is seek-

ing to have his conviction set aside because "everybody in New York but the courts recognized that blue ribbon juries were not impartial" (brief, p. 66).

Meaningful support for this assertion is lacking. Indeed, the most telling refutation of his thesis comes from the affidavit of his own trial counsel opposing the motion for the special panel:

> "The qualifications of a member of a special panel and that of a member of a regular panel are the same other than the former must entertain a belief in capital punishment while the latter need not.
>
> • • •
>
> "Since ordinary jurors and special panel jurors have the same qualifications, there is no reason for any delay. One question to the assembled panel of ordinary jurors would dispose of any who had conscientious scruples against capital punishment" (174A).

Further, the only pertinent comment pertaining to the question of prejudice that can be gleaned from the studies petitioner cites also rejects the conclusion that blue ribbon juries are proven biased. Thus, the 1952 Judicial Council report observes "there are no adequate facts that prove that the special jury is a convicting jury since it cannot be assumed that a banker is more 'prejudiced' against a person accused of murder than a plumber, or that males are more prone to convict than females, or that the more educated are so inclined to a greater extent than the less educated * * *" (A. App., 102a-103a). See also *Witherspoon* v. *Illinois*, 391 U.S. 510, 517-518 (1968), and *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968).

In an attempt to by-pass the well-defined reach of the *Bumper* and *Witherspoon* decisions, petitioner asserts that excluding those with scruples against capital punishment is a "systematic exclusion of [a] recognizable, identifiable group" forbidden by the Sixth Amendment (brief, p. 61). There are two problems with his argument.

First, never for Sixth Amendment purposes has "identifiable group" been so sweepingly defined by this Court as petitioner proposes to do. He might just as relevantly argue that a prosecution's exclusion of all veniremen who cannot partake in a lengthy trial is an unconstitutional exclusion of a "recognizable, identifiable group". But surely, not every conceivable grouping of individuals is subject to the Sixth Amendment reach petitioner would here assert. The rulings he cites (brief, pp. 61-62) invariably emanate from the exclusion of such precisely defined aggregations as women, wage-earners or Negroes. Moreover, were he correct, there would have been no basis for this Court to have refused to reverse Mr. Bumper's conviction on the initial ground it considered: violation of Sixth and Fourteenth Amendment right to trial by impartial jury. *Bumper* v. *North Carolina* (*supra*), 391 U.S. at 545. For partiality would never have to be shown, the mere act of excluding being sufficient to cause reversal.

Yet in the companion case, *Witherspoon* v. *Illinois* (*supra*), this Court repeatedly emphasized that left open was the question of excluding those veniremen who "would *automatically* vote against the imposition of capital punishment" (391 U.S. 522-523, n. 21; *id.* at 520) [emphasis in original]. Plainly, those who would automatically vote

against the imposition of the death penalty are an "identifiable group" under petitioner's definition and would therefore have to be included in capital case juries—automatically. Thus, his argument and the Court's approach to the problem in *Bumper* and *Witherspoon* are mutually exclusive.

Secondly, in order for petitioner to prevail, he must persuade that retroactive application for his far-reaching contention is in order. He is here on a denial of habeas corpus. The guidelines evolved by this Court in a series of cases beginning with *Linkletter* v. *Walker,* 381 U.S. 618 (1965) and summarized in *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967) compel rejection of a retroactive application of the rule petitioner seeks. Combining an absence of proof that special juries are improperly partial with the fact that New York has repealed the statute in question, adding the understandable reliance courts have in the past placed on this Court's unequivocal precedents, and topping it off with the broad effect that retroactive application would have on the administration of justice, in cases where the death sentence was not imposed, the rule petitioner calls for must be rejected in this case.

POINT VIII

The court's preliminary instructions to the jury, given before any testimony was heard, violated no fundamental rights of petitioner; the charge was similarly free of error [answering petitioner's brief, pp. 41-42, 71-72].

Petitioner charges that the trial court "impaired the petitioner's privilege against self-incrimination" by "misinform[ing] the jury" of his constitutional right to remain silent (brief, p. 41). His contention is without merit.

Petitioner's argument is directed at two distinct parts of the trial: comments by the trial judge prior to the openings and presentation of evidence; and a section of the court's final charge to the jury. Petitioner's arguments will be dealt with in that order.

When, after a week of *voir dire,* the jury was finally selected, the trial court briefly set forth a series of instructions. Included was the warning,

> "In civil cases whichever side produces the preponderence of evidence, that is the side that prevails. When you get to the trial in a civil case and the defendant does not open his mouth, does not come forward to defend himself, he has to lose the case. That is civil law. But there is no such thing in criminal law. As has been told to you here, and I will tell it to you again, a person accused of crime does not have to do anything. This is a fundamental principle of the law in this case and any case in this land. A person accused of crime is presumed to be innocent at all times until a jury finds him otherwise. Those are not just words. If

you don't believe that now, gentlemen, you have no business sitting on the jury. That is the law. You don't have to like it or agree with it, but you have to follow it. And that is the law of this case and every case. Therefore, that being the law, there is no burden upon the person accused of a crime of doing anything but presenting himself in court. That he must do.

"If a person accused of crime wishes to testify he has the privilege to do so. That he may exercise. He does not have to. And it may not be commented upon at any time if he does not do so. He may produce witnesses and he may not. So in the ordinary course of events the People, having made certain accusations in writing, the burden is upon the People to prove their case" (60-1).

The petitioner excerpts from these remarks and asserts that an "adverse inference" may be drawn concerning defendant's failure to testify (brief, p. 42). The fallacy is that he misconstrues plain language. These introductory remarks, before the opening addresses, simply directed the jury's attention to the rules of the proceeding about to commence. Although instructions to a jury before the evidence is adduced is not statutorily mandated, such a procedure is sound where the court has every reason to believe that the proof will be extensive and complicated. It serves the valuable function of assisting the jury in properly evaluating the testimony to come. The advance warning to the jury to disregard a defendant's failure to produce witnesses or testify was especially helpful to him in the instant case where a normal jury might have otherwise expected, and awaited throughout the trial, the defendant's "side of it." It is therefore remarkable that the petitioner now asserts prejudice in the court's preliminary admoni-

tion. The more so when it is noted that there was objection neither to it nor to that section of the court's charge of which petitioner now complains (2179; brief, pp. 41-2) (see also 2177, 2180). Understandably so, since the charge was a proper statement of petitioner's rights (*ibid.*).

Not in any proceeding prior to today has petitioner challenged the charge. In the Appellate Division and the Court of Appeals in New York, petitioner focused solely on the trial judge's comments to the jury prior to adduction of evidence (Appellant's brief to App. Div., pp. 159-164; Appellant's reply brief to App. Div., pp. 35-36; Appellant's brief to N.Y. Ct. of Ap., pp. 73-77). In each of these courts respondent pointed out that no criticism of the trial court's charge was being raised (Respondent's brief to App. Div., p. 89; Respondent's brief to N.Y. Ct. of Ap., p. 82). In neither of his motions to amend the New York Court of Appeals' remittitur did petitioner challenge the charge; nor, for that matter did he complain against it when he appealed and in the alternative applied for certiorari to this Court, or later when he sought a rehearing before this Court (Appellant's briefs to U.S. Supreme Court, October Term, 1966, No. 793). Indeed, his prior applications to this Court made no mention of any of the trial court's instructions.

In the District Court, the petitioner did not complain of any of the trial court's pre- or post-evidentiary instructions in his application for habeas corpus. However, following Judge PALMIERI's denial of the writ, petitioner, during oral argument in support of his motion for a certificate of probable cause pursuant to 28 U.S.C. 2253, did raise the question of the trial court's opening remarks.

In granting the certificate, Judge PALMIERI tersely dismissed petitioner's limited attack on the trial court's opening comments (A. App., 40a). In the United States Court of Appeals, petitioner renewed the argument he had pressed orally on his application for a probable cause certificate (Appellant's brief to the U.S. Ct. of Ap., pp. 44-47). Respondent, in opposing, again pointed out that the complaint was not against any portion of the charge (Respondent's brief to the U.S. Ct. of Ap., p. 43). And during oral argument in the court below, petitioner appeared to concede not only that he was not challenging the trial court's charge, but that his opportunity to do so had been irrevocably waived:

> "Judge Feinberg: Before you get to that, the D.A. says the Judge said this in his final charge to the jury and that no one objected.
>
> "Mr. Rogge: There was not an objection. I don't think this can be cured. You are right. There wasn't an objection." (Excerpted from p. 46 of minutes of oral argument submitted to the United States Court of Appeals by petitioner at the court's request.)

With this somewhat lengthy procedural history in mind, it is difficult to understand how the petitioner can now challenge the charge.

The petitioner also argues that because federal judges may not call attention to the defendant's silence if the defendant has not requested such an instruction (brief, pp. 71-72), the state courts are similarly bound not to admonish the jury. He reasons that the federal prohibition is constitutional and made applicable to the states by *Griffin* v. *California,* 380 U. S. 609 (1965), and *Malloy* v. *Hogan,*

378 U. S. 1 (1964), asserting that the latter case "overruled" *Adamson* v. *California,* 332 U. S. 46 (1947) and *Twining* v. *New Jersey,* 211 U. S. 78 (1908) (brief, p. 71). He is wrong on both counts, for the cited cases do not stand for the sweeping principle he urges and, in any event, the federal standard is set forth by statute, and has never assumed constitutional magnitude. See Act of March 16, 1878, 20 Stat. 30, now 28 U. S. Code §632; see also, *Bruno* v. *United States,* 308 U. S. 287, 292 (1939). The charge concerning the petitioner's silence was succinct and respectful of his rights. In every way it met with the petitioner's suggested standard (brief, p. 72).

POINT IX

Publicity did not interfere with petitioner's right to a fair trial [answering petitioner's brief, pp. 42-44, 73-74].

Petitioner also contends that "the police launched an avalanche of charges, information and misinformation to the press which had the effect of * * * vitiating his right to a fair trial" (brief, p. 42). The record lends no substantiation to this argument.

Despite the publicity that attended the arrest and arraignment of the petitioner in the winter of early 1964, there is not one scintilla of proof tending to show that it interfered with his right to an impartial trial. The conflict that sometimes arises between a defendant's right to a fair trial and the Fourth Estate's right to publish is a genuinely troublesome one. But peaceful co-existence—demanded by the Constitution—is impossible when it is

claimed, as here, that the mere occurrence of unfavorable publicity strips an accused of his constitutional safeguard.

While petitioner now ignores the manner in which he protected himself against preconceived opinions, it is a matter of record that for many months prior to trial he was alert to the problem. He sought and obtained continuances from time to time expressly to postpone trial until the newspaper accounts would be forgotten (61A). Then, in June, 1964, by habeas corpus petition, appellant moved for an immediate trial, and at the subsequent hearing his counsel referred to the publicity "at the time of arraignment or shortly thereafter, of the fact that it would be impossible then to receive a fair trial. I suppose everybody in this courtroom read the newspapers at that time. But time has passed since then. We are willing to go to trial now" (147A). Nor did the petitioner change his position four months later when the trial finally commenced even though he had been free on bail since July of that year (161A-162A,.4-7). Thus, petitioner's assertion that he faced the Hobson's choice of immediate trial or indefinite incarceration, while applicable to the June proceedings, no longer applied in October, 1964 (brief, p. 49). And yet his position about proceeding to trial, remained unchanged in the autumn.

In addition to the foregoing acknowledgment, it is significant, and both the District Court and the New York Court of Appeals so observed, that the petitioner never moved for a change of venue, the recognized method of avoiding the prejudicial effects of a plethora of local press accounts (A. App., 34a, 43a). See New York Code of Criminal Procedure, §344(2).

The petitioner cites several cases in support of his demand for a new trial on the ground of prejudicial statements *dehors* the courtroom. These authorities stand for materially different propositions than the one he asserts here. Unlike the instant proceeding, in all but one of those cases the defense sought unsuccessfully either a change of venue from the place where the trial was held or a continuance pending a lull in publicity. And in the one exception, court, jury and defense counsel were so terrorized by fear of mob violence that that case has doubtful relevance to the one at bar. See *Moore* v. *Dempsey,* 261 U. S. 86 (1923). This is not to say that the cited motions are the *sine qua non* of preserving the issue for review. But the defense decision to proceed to trial without moving for a change of venue does suggest how little it deemed publicity a burdensome interference. Indeed, the record suggests that petitioner's family was using the press for its own ends (3837-8).

Moreover, in the cases cited, the publicity complained of almost invariably occurred in the non-urban setting of the crime. Near-saturation of the local populace, and thus prospective jurors, was more likely. Where the crime did take place in a metropolitan setting, the proof tendered showed such extensive and bitter radio, television and press coverage that prospective jurors, both grand and petit, were necessarily exposed. Frequently the publicity included "substantial evidence" which in fact was not introduced at trial, such as a confession. In support of their motions for continuance or change of venue, the lawyers there involved offered substantiation for their charge, including polls testing the opinions of local citizenry. *E.g.,*

Sheppard v. *Maxwell*, 384 U. S. 333, 345-6 (1966). Not only did the petitioner by-pass such motions, but to this day, he has offered no support, other than his own statement, that jurors were prematurely partial.

In addition, all too often, in the cited cases, the trial judge gave only the most cursory admonition to the jurors concerning their obligation to avoid reading, or listening to discussions about the case. It is a matter of record that the court below admonished the jury on more than 80 separate occasions "not to look at, listen to or read" anything not received in evidence at trial. Interspersed with these directions were occasional warnings of contempt proceedings against jurors if they failed to obey. *Cf. Sheppard* v. *Maxwell*, *supra*, at p. 353. In commenting on the trial court's care, defense counsel observed, "I want to thank your Honor for all the admonitions you have given the jury" (1675).

While the trial was in progress, a column appeared in a local newspaper which petitioner deemed unfavorable to his defense. At the petitioner's request, the court conducted a special *voir dire*. The result: not a single juror had read the article. *Cf. Sheppard* v. *Maxwell*, *supra*, at p. 357. Petitioner now complains that one trier of fact saw —not read—the article, entitled in big print, "THE FEIN TRIAL" (brief, p. 43).

His present unfounded charge that that juror must have been influenced flies in the face of an expressed representation to the contrary and petitioner's acceptance of it at the time. The petitioner neither moved to substitute that trier of fact with an alternate, nor suggested a mistrial.

The law should not, and will not, permit reversal where a defendant knowingly accedes to a given procedure for reasons of his own, and then, upon conviction, seeks further litigation upon the allegation that the very procedure he acceded to was error.

In sum, petitioner has not shown that an impartial jury could not be, and was not in fact, chosen. His argument is completely devoid of facts showing "that any community prejudice ever existed or in any way affected the deliberations of the jury," the prerequisite he must meet to sustain his charge. *Stroble* v. *California,* 343 U. S. 181, 195 (1952).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

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